Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

No.

In the

Supreme Court of the United States

CHARLIE ANNIS, MARY K. BERGEN, JERRY BRITTAIN, GORDON CALERWOOD, WALTER CROW, QUINTON DAVIS, DON FIELDS, BOB GLANDON, TOM HAMILTON, DON HANLEY, LARRY HENSLEY, LARRY HILLYARD, BOB HURST, LEROY KEENER, JERRY C. MILLER, DOYLE MILLS, BOB NEELY, K. DON RISINGER, JERRY STURGEON, BILL VILLINES AND DEE WELLS

Petitioners

v.

OKLAHOMA LAW ENFORCEMENT RETIREMENT BOARD; ROY ROGERS; LINDA AKER, SCOTT BEHANNA; RENDA REESE-DAVIS; MICHAEL DIXON; JIM KING; JUNE KLAASSEN; KEITH LEIMBACH; JAN MILLER; JAMES PETE PETERSON; HARRY ROSENGRANTS; KEVIN WARD; AND PHILIP R. KEY

Respondents

On Petition for Writ of Certiorari To the United States Court of Appeals for the Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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35 pp

QUESTIONS PRESENTED

1. Whether the Tenth Circuit Court of Appeals erred when it found that legislation passed following the decision in this case by the Western District Court prevented the Petitioners from suffering any continuing or future damages, thus Petitioners' action was moot, and did not find that the passage of specific, "ex post facto law" by legislature to solely designed to eliminate Petitioners' cause of action is unconstitutional and in violation of Article II, Section 15 of the Oklahoma Constitution?

2. Whether the Tenth Circuit Court of Appeals erred when failed to considered the issues raised by Petitioners finding that any claims by Petitioners were barred by the statute of limitations, notwithstanding that there is no Oklahoma statute of limitations with respect to challenging the constitutionality of legislative action?

3. Whether the Tenth Circuit Court of Appeals erred when it refused to find that the trial court's decision, which changed and altered the "existing rights" of Highway patrolmen to the benefits of a pension program into which they had paid contributions for years, is in direct violation of 74 Okla. Stat. (2000) §923?

4. Whether the Tenth Circuit Court of Appeals erred when it refused to consider that an action to recover vested or owned property is not barred an statute of limitations found in Oklahoma law?

5. Whether the Tenth Circuit Court of Appeals erred when it failed to find that there is no statute of limitation found in Oklahoma law which would barr an action brought for a declaratory judgment seeking prospective relief only?

PARTIES TO THE PROCEEDINGS

The following parties were named as Plaintiffs in the case and are currently appearing as Petitioners:

CHARLIE ANNIS, MARY K. BERGEN, JERRY BRITTAIN, GORDON CALERWOOD, WALTER CROW, QUINTON DAVIS, DON FIELDS, BOB GLANDON, TOM HAMILTON, DON HANLEY, LARRY HENSLEY, LARRY HILLYARD, BOB HURST, LEROY KEENER, JERRY C. MILLER, DOYLE MILLS, BOB NEELY, K. DON RISINGER, JERRY STURGEON, BILL VILLINES AND DEE WELLS

The following parties were named as Defendants in the case and are currently appearing as Respondents:

OKLAHOMA LAW ENFORCEMENT RETIREMENT BOARD; ROY ROGERS; LINDA AKER; SCOTT BEHANNA; RENDA REESE-DAVIS; MICHAEL DIXON; JIM KING; JUNE KLAASSEN; KEITH LEIMBACH; JAN MILLER; JAMES PETE PETERSON; HARRY ROSENGRANTS; KEVIN WARD; AND PHILIP R. KEY

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PETITION FOR WRIT OF CERTIORARI

OPINIONS AND ORDERS BELOW

1. On April 24, 2003, the Tenth Circuit Court of Appeals affirmed the decision entered by the United States District Court for the Western District of Oklahoma.

2. No Petition for rehearing was filed.

3. Judgment was entered in the District Court for Western Oklahoma on July 19, 2002, without published opinion.

JURISDICTIONAL STATEMENT

Petitioners seek review of the Tenth Circuit decision rendered in their case on April 24, 2003. No petition for rehearing was filed in the case. No extension to file for a writ of certiorari has been sought in this case. Jurisdiction is proper pursuant to Supreme Court Rule 10.1(c), which allows the Court to assume jurisdiction in a case where "a United States court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decision of this Court."

STATUTORY PROVISIONS AT ISSUE

United States Constitution, Fourteenth Amendment

§1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or

immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Oklahoma Constitution, Article 2, Section 15

15. Bills of attainder - Ex post facto laws - Obligation of contracts.

No bill of attainder, ex post facto law, nor any law impairing the obligation of contracts, shall ever be passed. No conviction shall work a corruption of blood or forfeiture of estate: Provided, that this provision shall not prohibit the imposition of pecuniary penalties.

Oklahoma Constitution, Article 5, Section 54

§ 54. Repeal of statute - Effect.

The repeal of a statute shall not revive a statute previously repealed by such statute, nor shall such repeal affect any accrued right, or penalty incurred, or proceedings begun by virtue of such repealed statute.

Title 74, Oklahoma Statutes, Section 923(A)

A. Except as otherwise provided by this section, no alteration, amendment, or repeal of this act shall affect the then existing rights of members and beneficiaries, but shall be effective only as to rights which would otherwise accrue hereunder as a result of services rendered by an employee after such alteration, amendment, or repeal. Any annuity, benefits, fund, property, or rights created by or accruing to any person under the provisions of this act shall not be subject to execution, garnishment or

attachment, or any other process or claim whatsoever, and shall be unassignable, except as specifically provided by Section 901 et seq. of this title.

STATEMENT OF THE CASE

Petitioners, Charlie Annis (as the representative of the group) and the other Oklahoma State Troopers, (collectively "Petitioners"), respectfully request this Court to exercise its discretion and grant certiorari in the above captioned case to review the opinion rendered by the Tenth Circuit Court of Appeals on April 24, 2003. Rehearing was not requested. Certiorari is proper in this case not only because the decision of the Court of Appeals is in conflict with previously established law, but also because the Court departed form the accepted and usual course of judicial proceedings in failing to apply the law of Oklahoma to the facts as found by the Trial Court. The decision fails to consider the important and critical constitutional rights of the parties and thus must be vacated. Both Oklahoma and federal law justify action by this Court.

STATEMENT OF FACTS

The Petitioners in this case were all patrolman of the Oklahoma Highway Patrol who have retired from the Oklahoma Department of Public Safety. Petitioners became vested in their retirement plan prior to July 1, 1980, though many of them continued as active troopers for many more years, following the vesting. Although each trooper retired on a different date, the issues of law are identical as applied to each individual Petitioner's cause of action.

Without exception, at the time each of these Petitioners were hired by the Oklahoma Department of Public Safety, the retirement plan in effect to be applied to each individual by the

Statute Troopers' retirement board required payment of fifty percent (50%) of a base trooper's salary as retirement benefits. Under the applicable formula, each time the base trooper salary increased, all retired troopers were to receive an increase in retirement benefits as established in 47 O.S. § 2-305 (pre-July 1, 1980).

In the present action, these Petitioners retirement benefits were vested prior to July 1, 1980. Notwithstanding the fact that Oklahoma law specifically provides that vested pension benefits cannot be changed by legislative enactment under Oklahoma Law, on July 1, 1980 the Oklahoma Legislature enacted legislation which changed the formula for pension benefits such that rather than granting an automatic increase in benefits following a raise in base trooper pay, the benefit paid was based on a percentage of the last five (5) years wages. 47 O.S. § 2-305.

Under the statutory 1980 formula (Okla. Stat. supra), there was no automatic increase in the pension benefits and the pension amount remained static. The Respondent, Oklahoma Law Enforcement Retirement Board ("Respondent") applied the new 1980 formula to the retirement benefits due each of these Petitioners notwithstanding the fact that they had each vested under the pre-1980 law. The application of the different formula caused each Petitioner to receive a lesser amount of benefit than would have been due had retirement been taken at the time the plan vested.

The present action was filed on March 8, 2001, which was more than twenty years after the 1980 legislation, but at different lengths of time from the date of each Petitioner's retirement. Respondent filed a Motion to Dismiss, claiming that the Oklahoma statute of limitations had run on the claims. The trial court granted the motion in a Memorandum Order of

March 5, 2002.

Following the entry of the March 5, 2002 judgment, the Oklahoma legislature amended Okla. Stat. Tit. 47, §2-305, to re-instate the original formula that would allow the proper payment of benefits to Petitioners effective on July 1, 2002. Because the legislative action granted the prospective relief previously requested by Petitioners, the Tenth Circuit Court of Appeals ruled that Petitioner's appeal was moot.

ARGUMENT AND AUTHORITIES

OVERVIEW

More than one hundred years ago, in ***Chicago & Grand Trunk R. Co. v. Wellman***, 143 U.S. 339, 345, 12 S.Ct. 400, 36 L.Ed.2d 176 (1892), this Court recognized its very important role in determining the rights of an individual against the acts of government. This principal is no less true today than it was at the time the decision was rendered. In keeping with this important goal, this Court should exercise its discretion and grant certiorari in the present case in order to vindicate the significant constitutional rights of these Petitioners who spent their careers protecting Oklahoma citizens.

Although this case presented identical issues to those found in ***Baker v. Oklahoma Firefighters Pension and Retirement System***, 1982 OK 8, 718 P.2d 348, a completely different result was reached by the federal courts. Both cases involve with state employees seeking to recover retirement benefits based upon repealed/amended statutes. In ***Baker***, the Oklahoma Supreme Court held that pension benefits may not be changed once an employee becomes vested:

"Those firefighters and police offices who had

> retired or who could have retired and became eligible for payment of pension benefits prior to the effective dated of the repeal of the pension adjustment provisions acquired a right under those provisions which may not be detrimentally . . ."

The decision by both the trial court and the Tenth Circuit Court of Appeals ignores important principles of Oklahoma law and federal constitutional due process rights. This Court must intervene to ensure that the rights of these law enforcement Petitioners are vindicated and that they receive the pension benefits which were promised to them by the State of Oklahoma.

PROPOSITION I

THE TENTH CIRCUIT COURT OF APPEALS VIOLATED THE TERMS OF THE OKLAHOMA CONSTITUTION WHEN IT FOUND THAT SUBSEQUENT ACTION BY THE OKLAHOMA LEGISLATURE MOOTED THE ALLEGATIONS OF PETITIONERS' CLAIMS.

It is very clear under Oklahoma law that subsequent actions taken by the Oklahoma legislature may not be applied to moot an existing cause of action. As set out previously in this Petition, the terms of Article 5, § 54 of the Oklahoma Constitution could not be more specific with respect to this issue. The statute states unambiguously "nor shall such repeal affect any accrued right . . . or proceedings begun by virtue of such repealed statute." Undeniably, the Tenth Circuit failed to

consider the effect of this important constitutional protection when it refused to consider Petitioners' claims on the merits.

Additionally, the terms Article II, Section 15 of the Oklahoma Constitution were not considered by the court, which prevent the passage of specific, "ex post facto law" by legislature to solely designed to eliminate Petitioners' cause of action is unconstitutional and in clear violation of the Oklahoma constitution. Certiorari should be granted in this case to allow Petitioners to proceed with their claims.

PROPOSITION II

THERE IS NO STATUTE OF LIMITATIONS WITH RESPECT TO CHALLENGING THE CONSTITUTIONALITY OF LEGISLATIVE ACTION, THUS THE TENTH CIRCUIT COURT ERRED WHEN IT FAILED TO ADDRESS THE MERITS OF THE ACTION.

While Respondents have consistently disputed the proposition that there is no limitation period which restricts the challenge to legislative action, they have never cited any law or authority which specifically establishes their point. It is the obligation of a proponent of a position to support the defense. There is no statute of limitations which specifically applies in this case, thus, Respondents were never able to provide such authority. The Tenth Circuit Court of Appeals' reference to the general statute of limitations applicable with respect to actions sounding in tort or contract are quite simply not applicable in this action.

Because there is no statute of limitations applicable to a challenge to the unconstitutionality of legislation, it is

impossible to cite to specific authority; however, examples of the concept are replete in the law. A primary example can be found in death penalty litigation.

Despite the fact that the death penalty was legal in nearly every state for decades prior to 1972, this Court found no time bar to consideration of the constitutionality of the punishment in 1972, when it declared the death penalty to be a violation of the Eighth Amendment prohibition against cruel or unusual punishment in ***Furman v. Georgia***, 408 U.S. 238 (1972). The same was true when the Court considered the constitutionality of the execution of juveniles in ***Thompson v. Oklahoma***, 487 U.S. 815 (1988),

Similarly, the Oklahoma Supreme Court failed to consider a limitations period in ***General Motors Corp. v. Oklahoma County Board of Equalization***, 1983 OK 59, 678 P.2d 233, where it found that a taxation plan passed in 1961 was unconstitutional as applied to the Oklahoma City General Motors factory. The affirmative defense of statute of limitations was not even an issue in the case.

The same was true in ***State ex Rel. Tharel et al. v. Board of County Com'rs of Creek County,*** 188 Okla. 184, 1940 OK 468, where the court held in the syllabus,

> "The general rule is that an unconstitutional statute, though having the form and name of law, is in reality no law, but is wholly void, and in legal contemplation is as inoperative as if it had never been passed. It imposes no duties, confers no rights, bestows no power or authority on anyone, affords no protection and justifies no acts performed under it."

The court explained that "if the Legislature has not acted within the framework of the Constitution, it has not acted. An unconstitutional statute confers no rights, creates no liability, and affords no protection. ***Norton v. Shelby County***, 118 U.S. 425, 6 S.Ct. 1121, 30 L.Ed. 178." The court also noted the holding in ***Zane v. Hamilton County***, 189 U.S. 370, a case involving county bonds which were issued pursuant to a statute which was later declared to be unconstitutional. This Court held that because the bonds were illegally issued, there was no contract subject to the protection of the Federal Constitution. The Court quoted §16A Am.Jur.2d, Constitutional Law, 688, which states:

> "The Federal Constitution does not protect contracts which are invalid, illegal ... That which is not an enforceable contract right is not an obligation which can be impaired within the meaning of the constitutional prohibition. The impairment of a contract cannot occur where the alleged contract is based on a proviso contained in a void statute. A contract which rests on an unconstitutional statute is itself void and creates no obligation to be impaired by subsequent legislation."

See also ***State v. Humdy***, 1994 OK CR 35, 875 P.2d 429, where the Oklahoma Court of Criminal Appeals, in 1994, found a 1981 amendment to a criminal statute to be unconstitutional.

In short, jurisdiction was properly established in the district court to consider the constitutional application of a statute to a particular situation at any time the issue is appropriately before the court. The statutes of limitation cited by Respondents are applicable only at the time when an action for damages is brought based on the effects of the

unconstitutional pension plan in effect. ***Without exception, the cases cited by Respondents in their briefings below, deal with specific acts to which specific statutes of limitation may be applied.*** There is no such claim in this action to which the general limitations statutes may be applied. This litigation must be considered on the merits. Both the trial court and the Court of Appeals erred when such consideration was not made.

PROPOSITION III

BECAUSE OF THE UNIQUE NATURE OF PENSION FUND BENEFITS AS DEFINED BY OKLAHOMA LAW, THE LEGISLATIVE ACTIONS TAKEN BY THE OKLAHOMA LEGISLATURE MUST BE SCRUTINIZED BY THIS COURT.

Oklahoma law is clear that once a law enforcement officer has vested in the plan, the contractual nature of the obligation changes to an inalienable property right. See 25 Okl. Op. Atty. Gen. 109 (March 28, 1996). The opinion could not be more clear that the pension benefits offered by Respondents are significantly different from those offered to other public employees.

In its opinion, the Attorney General finds that the rights of a pensioner of OLERB pension benefits were different from those of other public employee pension funds. The Attorney General noted that the Oklahoma Supreme Court, in ***Baker v. Oklahoma Firefighters Pension and Retirement System***, 1982 OK 8, 718 P.2d 348, found that because of the twenty year period required for vesting in either the Firefighters' pension fund or the Law enforcement pension fund, "the right to the retirement pension benefits provided to firefighters and police officers under our state statutory schemes becomes absolute at the time those benefits become payable to those eligible....."

(Emphasis ours)

In addition to these specific cases, Oklahoma law is very clear that once a property right vests, it cannot be changed by either legislation or judicial action. See ***Ricks Exploration v. Okl. Water Resources Bd.,*** 695 P.2d 498 (Okl. 1984)(a vested right, once created, becomes absolute and is protected from legislative invasion). The important distinction between a vested, inalienable property right and that of a right arising from contract is critical in this case. Accordingly, statutory regulation of rights under contracts is completely inapplicable in this case, as is any case involving a specific claim of damages as a result of.

In short, the present case requires this Court to recognize that the questioned legislation presents an issue with respect to the property rights of the officers involved. It is not simply an action sounding in tort or contract seeking damages for a breach. These officers were vested in their pension, yet the legislature acted in a manner which impaired their right to benefits. This impairment continues each and every month as the appropriate amount of retirement pay is not paid as required. To deny these Appellants an opportunity at any point to challenge the withholding of their hard-earned retirement dollars on any basis, particularly a contract limitations defense, is to countenance a continuing wrong.

This is not a case which presents a debtor-creditor relationship between the parties, to which breach of contract analysis and limitations is applicable. Respondents are in a fiduciary relationship to each Petitioner and are holding and refusing to pay appropriate amounts of retirement money—money the right to which has been fully vested. This litigation should have been allowed to proceed on the merits and the Tenth Circuit opinion denied this right to Petitioners. This

Court must intervene to prevent the subversion of justice and the denial of important constitutional rights to Petitioners.

CONCLUSION

The petitioner for writ of certiorari should be granted.

Respectfully submitted,

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Counsel for the Petitioners

JULY, 2003

APPENDIX

APPENDIX A
Filed March 5, 2002

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

No. CIV 01-418A (Marten)

MICKEY D. ADAM, et al,

Plaintiffs,

v.

OKLAHOMA LAW ENFORCEMENT RETIREMENT BOARD as set forth in Oklahoma Statutes Title 47 Sections 2-300 et seq., et al.,

Defendants

MEMORANDUM ORDER

Currently before the court in this action challenging the Oklahoma system of law enforcement retirement benefits is the motion by the defendants to dismiss on the grounds that the action is barred by the statute of limitations. Plaintiffs challenge the constitutionality of the Oklahoma legislature's decision in 1980 to alter the formula for retirement benefits. Plaintiffs are former highway patrolmen who were vested in the retirement system by July 1, 1980.

The present action was filed on March 8, 2001, over twenty years after the challenged legislation. Despite

repeated opportunities, plaintiffs have never effectively addressed the issue of the statute of limitations, other than speculating, without authority, that either no statute of limitations applies to their claim, or that the complaints may somehow be maintained pursuant to 12 O.S. §101. The general Oklaoma Statute of Limtiations, 12 O.S. Supp. 2000 §95, governs the action. It provides:

> Civil actions other than for the recovery of real property can only be brought within the following periods, after the cause of action shall have accrued, and not afterwards:
>
> 1. With five (5) years; An action upon any contract, agreement or promise in writing;
>
> 2. Within three (3) years; An action upon a contract expressed or implied not in writing; an action upon a liability created by statute other than a forfeiture or penalty; and an action on a foreign judgment;
>
> 3. Within two (2) years; . . . an action for injury to the rights of another.

Here, the cause of action began at the time of the challenged legislative act. See *Gilbert v. City of Cambridge*, 745 F. Supp., 42, 46 (D. Mass. 1990). Pursuant to subsection 2 of the statute of limitations, the plaintiffs had three years from

action asserting violation of state constitution was a claim "upon a liability created by a statute" within meaning of the statute of limitations). But, even assuming the longest statute of limitations period (five years for actions upon contract) applied, the present action's claims asserting state constitutionality violations would remain outside the time permitted by law. With respect to plaintiff's claims asserting violation of the federal constitution, such claims are subject to the two-year limitations period of ran action "for injury to trights of another." *Meade v. Grubbs*, 841 F.2d 1512. 1522-24 (10th Cir. 1988).

There is no tolling doctrine or other exception to the time bar applicable in the rpesent action. For example, there is no conflict between defendants' actions and existing Oklahoma or federal statutes. *Cf. Elelphant Butte Irr. Dist. V. Department of Interior*, 160 F. 3d 602 (10th Cir. 1998). Section 101, which provides for tolling of the statute in certain cases such as partial payment of an acknowledged debt or upon an open account, has no application herein. Plaintiffs have wholly failed to demonstrate the payment of any disputed amounts by the defendants any written acknowledgment of an existing liability, or a promise in writing signed by the defendants to pay the claims of the plaintiffs.

In sum, the time bar of §95 applies. Plaintiffs have failed to identify any credible basis for avoiding application of the bar.

IT IS ACCORDINGLY ORDERED this 27th day of February, 2002, that the defendants' Motion to Dismiss is hereby granted.

J. THOMAS MARTEN, JR.
ENTERED ON JUDGMENT DOCKET ON MAR 5, 2002

APPENDIX B

FILED 4-23-02

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 02-6246
D.C. No. CIV-01-418-M
(Western District of Oklahoma)

MICKEY D. ADAM; CARL ALEXANDER; FLOYD W. ALLEN; JACK L. ALLEN; JAY E. ANGLIN; CHARLES F. ANNIS; PERRY R. RABB; AUTHER DEWAYNE BARNES; LARRY T. BARTON; K. B. BERGEN; CHESTER BLACK; DAVID D. BLACKBURN; BILL BLUE; S. T. BOLDING; CLAUDE L. BOLLENBACH; JERRY ZANE BRITTAIN; BOBBY BURLESON; ROBERT L. BURCH; ED C. BURR; GORDON W. CALERWOOD; JOSEPH E. CAMPBELL; JOE E. CANTRELL; OLEN M. CARR; L. H. CHILDRISS; MADISON H. CLINTON; JIM 0. COFFMAN; GERALD COLEMAN; DON COMPTON; JOE DAVID COOK; JOE COOKSON; ALLEN CORDER; CHARLES D. CRABTREE; ROGER A. CRANE; DELBERT L. CROUCH; WALTER CROW; JIMMIE DAVID; JONANN DAVIS; JOHN H. DAVIS; QUTHER LEE DAVIS; QUINTON

DAVIS; JIMMY A. DOANE; MICHAEL D. DUGGAN; JAMES R. DUNCAN; WILLARD J. EDGE, SR.; WANDA ELLIOTT; LUE E. ELLISON; FRANK EVERETT; AMOS HENRY FARR;KENNETH E. FERGARSON; DON FIELDS; J. D. FILIPSKI; ROBERT E. FOLTZ; JAMES C. FOX; FRANCIS JAMES FRECHER; B. W. FREEMAN; ARTHUR L. GARNER; JOE GIST; ROBERT U. GLANDON; JOHN B. GLATIAN; ALTON GRANT; JACK C. GREEN; MONTE M. GREEN; DONALD A. A. HALL; THOMAS M. HAMILTON; J. W. HAMMANS; RONNIE G. HAMMOCK; DON A. HANLEY; JAMES E. HARDIN; TOMMY 1. HARRIS; MIKE HARRISON; GEORGE HAUGEN; KARL HELLEN; LARRY G. HENISEY; DONALD R. HENLEY; JAMES R. HENLEY; LARRY L. HILLYARD; BILL HOLLARS; DON L. HOOD; FRED HORN; L. D. HORSTKOETTER; VIRGIL HOUSLEY; CURTIS D. HUGGINS; ROBERT E. HURST; DAVID IRWIN; DONALD M. JAMES; STEPHEN J. JANTZ; MERLIN JOHNS; PAUL N. JOHNSON; RONALD L. JOHNSON; JAMES R. JONES; LEE R. KEENER; LARENCE W. T. KELLY, JR.; L. D. KIRK; JUANITA KIZZIAR; ELMER R. KLEPPEL; RONALD G. KNOX; SAMUEL F. LAFFOON; KENNETH LANDES; TOM H.

LAVALLEY; WALTER LOY LEE; FRED LEVALLEY; JIM E. LOWER; JOHN MCBRIDE; CLIFFORD 0. MCCALL; RICHARD MCVAY; CLAY C. MILLER; JERRY C. MILLER; DOYLE MILLS; WILLARD MILLS; CARL D. MORELAND; DANNY W. MULLINS; DEAN P. NEAL; ROBERT DALE NEELY; CHARLES D. NEWTON; ANTHONY NICHOLS; DOUGLAS A. NICHOLS; ROBERT L. OARD; JIM D. PARKER; L. W. PARKER; LIBERTY W. PARKER, JR.; BOBBY R. PERRY; GARRY PIERCE; JOHME L. POTTS; DON D. POWELL; DONNIE POWERS; DAVID D. PRUITT; ROBERT L. QARD; JAMES T. RANDOLPH; MICKEY R. RAYBUR1'~; THOMAS R. RICHARDSON; VERNON L. RIDDLE; K. D. RISINGER; PAUL ROARK; GLYNN R. ROBERTS; ELMER L. ROBERTS; BILL D. ROBINS; DANIEL PAUL ROBINS; WOODROW F. ROBINSON; WILLIAM L. ROGERS; HAROLD DEAN ROLAND; JIM ROLLER; WILLIAM R. ROSENTHAL; DON BERR ROUSH; ARVIL G. RUDD; DON SANDS; DON SAVAGE; L. DUTCH SCHNEIDER; HARLEN T. SCOTT; BILL D. SHOBE; HERMAN H. SKELTON; GLEN SLAUGHTER; JOHN WAYNE SMITH; KENNETH SOUTHARD; JERRY STURGEON; NORMAN TALLY; RUSSELL TAYLOR;

SEQUOYAH JOHN TAYLOR; RONALD L. THOMAS; E. L. THOMPSON; JACK TILLERY; HOWARD TRIBBLE; CLYDE J. TUCKER; WILLIAM J. TUCKER; BILLY K. VILLINES; JAMES EVERETT VILLINES; STEVEN R. WAGNER; DONALD GENE WALLACE; FRANK J. WARD; EARL WARNER; JIM WASHBURN; CHARLES W. WATKINS; ERNEST L. WEEKS; CLYDE WELLS; ROBERT WHEALEN; JAMES WHITE; ELMO WILKERSON; CLAYTON C. WILKINSON; JOE LEE WILLIAMS; SAMMY WILLIAMSON; KENNETH WOODRUM; T. J. YSBRAND;

Plaintiffs - Appellants,

V.

OKLAHOMA LAW ENFORCEMENT RETIREMENT BOARD, as set forth in Oklahoma Statutes Title 47 § 2-300 Ct seq.; ROY ROGERS; LINDA AKER; SCOTT BEHENNA; RENDA REESE-DAVIS; MICHAEL DIXON; JIM IUNG; JUNE KLAASSEN; KEITH LEIMBACH; JAN MILLER; JAMES PETE PETERSON; HARRY ROSENGRANTS; KEVIN WARD; PHILIP R. KEY, each board members in their official capacity only,

Defendants - Appellees.

ORDER AND JUDGMENT

Before EBEL, LUCERO, and O'BRIEN, Circuit Judges.

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument.

Mickey D. Adam, other retired Oklahoma Highway Patrolmen, and some surviving spouses ("the Troopers") appeal a decision of the district court dismissing their complaint under FED. R. Civ. P. 12(b)(6) as barred by the statute of limitations. Exercising jurisdiction under 28 U.S.C. § 1291 (2002), we conclude the issues raised are moot and

dismiss the appeal.[1]

On March 8,2001, the Troopers filed suit against the Oklahoma Law Enforcement Retirement Board and board members ("Board"), claiming the Board, in calculating the Troopers' retirement benefits, violated their rights under the Oklahoma and U.S. Constitutions. The Troopers requested injunctive and declaratory relief.[2] When the troopers were hired, prior to July 1, 1980, Oklahoma law provided that after twenty years of service they would be eligible to receive a retirement benefit, payable monthly, calculated against

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[1]For the same reason, we dismiss the Troopers' appeal of the district court's denial of their FED. R. Civ. P. 59(e) motion to reconsider.

[2]Originally, the Troopers requested payment of unpaid retirement benefits, but later abandoned this claim without prejudice.

one-half ofthe prevailing annual base trooper salary.[3] On July 1, 1980, an amendment to this provision took effect and applied to all troopers eligible for retirement after the date of enactment.[4] It altered the means of calculating the retirement benefit, effectively lowering the monthly benefit as compared to the pre-1980 method of calculation. The Troopers challenged the application of this amendment to their retirement benefits, which they claimed were vested before July 1, 1980. None of the Troopers had retired prior to July 1, 1980.

The district court concluded the Troopers' cause of action arose on July 1, 1980, the effective date of the challenged amendment. Because the Troopers' complaint was filed more than twenty years after this date, the district court dismissed the Troopers' state and federal constitutional claims as time-barred under the statute of limitations

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[3]OKLA. STAT. tit. 47, § 2-305 (1979).

[4]OKLA. STAT. fit. 47, § 2-305(A) (July 1, 1980).

contained in OKLA. STAT. tit. 12, § 95.

As a preliminary matter, the Board argues this case is moot because the relevant statutes were amended after the district court rendered its March 5, 2002 decision. We review the issue of mootness de novo. Faustin v. City and County of Denver, 268 F.3d 942, 947 (10th Cir. 2001). "Mootness is a threshold issue because the existence of a live case or controversy is a constitutional prerequisite to federal court jurisdiction." McClendon v. City ofAlbuquerque, 100 F.3d 863, 867 (10th Cir. 1996) (citation omitted). See also Faust in, 268 F.3d at 947.

> It has long been settled that a federal court has no authority to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it. For that reason, if an event occurs while a case is pending on appeal that makes it impossible for the court to grant any effectual relief whatever to a prevailing party, the appeal must be dismissed.

Church of Scientology of Cal. v. United States, 506 U.S. 9,

12 (1992) (quotation marks and citations omitted).

The Oklahoma Legislature amended OKLA. STAT. tit. 47, § 2-305 in its 2002 regular session.[5] The amendment, which took effect July 1, 2002, effectively resolved the Troopers' complaints concerning future retirement benefits they claim are due, granting the Troopers the relief they sought. This much the Troopers concede. However, the Troopers urge us to declare the Board's actions between July 1, 1980, and July 1, 2002, to have been unconstitutional. This we cannot do. "When a party seeks only equitable relief, as here, past exposure to alleged illegal conduct does not establish a present live controversy if unaccompanied by any continuing present effects." *McClendon,* 100 F.3d at 867. A "plaintiff cannot maintain a declaratory or injunctive action unless he or she can demonstrate a good chance of being likewise injured in the future." *Beattie v. United*

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[5] The amendatory language is found in re-numerated subsections C and D of OKLA.STAT. tit. 47, § 2-305 (July 1, 2002).

States, 949 F.2d 1092, 1093 (10th Cir. 1991) (quotation marks and citation omitted). The Troopers have made no such showing.

Accordingly, we conclude the issues raised by the Troopers in their appeal are moot, and **DISMISS** the appeal.

Entered by the Court:

TERRENCE L. O'BRIEN
United States Circuit Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

No. CIV 01-418A
(Marten)

MICKEY D. ADAMS, et al,

Plaintiffs,

vs.

OKLAHOMA LAW ENFORCEMENT RETIREMENT BOARD as set forth in Oklahoma Statutes Title 47 Sections 2-300 et seq., et al.,

Defendants.

MEMORANDUM ORDER

This matter is before the court on the plaintiffs' Motion for New Trial pursuant to Fed. R. Civ. Pr. 59. The court previously granted summary judgment in favor of defendants, holding that the plaintiffs' claims against the defendants based upon legislation altering the formula for calculating retirement benefits were time-barred under Oklahoma law. The plaintiffs present no argument in their motion which would justify the relief sought.

A motion to reconsider under Fed.R.Civ.Pr. 59(e) may be granted to correct manifest errors, or in light of newly discovered evidence; such a motion is directed not at initial consideration but reconsideration, and is appropriate only if the court has obviously misapprehended a party's position, the facts, or applicable law, has mistakenly decided issues

not presented for determination, or the moving party produces new evidence which it could not have obtained through the exercise of due diligence. *Anderson v. United Auto Workers*, 738 F.Supp. 441, 442 (D. Kan. 1989). A motion to reconsider is not "a second chance for the losing party to make its strongest case or to dress up arguments that previously failed." *Voelkel v. GMC*, 846 F.Supp. 1482 (D.Kan.), affd, 43 F.3d 1484 (10th Cir. 1994). The resolution of the motion is committed to the sound discretion of the court. *Hancock v. City of Oklahoma City*, 857 F.2d 1394, 1395 (10th Cir. 1988).

In its prior order, the court held that 12 O.S. Supp. 2000 § 95 governs the present action. Nothing in the Motion for New Trial supports the conclusion that this holding was in error. Plaintiffs acknowledge they have no direct authority for the proposition that they may commence an action challenging a legislative amendment over two decades after it became law. The plaintiffs' suggestion that the matter is somehow different because it raises constitutional issues, is simply
contrary to Oklahoma law. See City of *Oklahoma City v. Daly*, 316 P.2d 129 (Okla. 1957) (civil action asserting violation of state constitution was a claim "upon a liability created by a statute" within meaning of the statute of limitations). The plaintiffs make no attempt to explain how their action is consistent with Daly and the other authorities cited in the court's prior opinion.

Further, the various authorities the plaintiffs do cite are inapposite. *United States v. Wurts*, 303 U.S. 414, 418 (1938) and *Bay Area Laundry & Dry Cleaning Pension Trust Fund v. Ferbar Corp.*, 522 U.S. 192 (1997) involve rights of action under federal law. Bay Area Laundry, for example, deals with rights under a specific federal statute, the Multiemployer Pension Plan Amendments Act of 1988, 29 U.S.C. § 1381. Neither case deals directly or indirectly with

Oklahoma law.

In sum, the time bar of § 95 applies. No basis has been shown for the application of any tolling provision under Oklahoma law.

IT IS ACCORDINGLY ORDERED this 17th day of July, 2002, that the plaintiffs' Motion for New Thai is hereby denied.

/s/ THOMAS MARTEN, JUDGE

Filed July 19, 2002

Supreme Court, U.S.
FILED
OCT 29 2003
OFFICE OF THE CLERK

No. 03-493

In The
Supreme Court of the United States

CHARLIE ANNIS, MARY K. BERGEN, JERRY BRITTAIN, GORDON CALERWOOD, WALTER CROW, QUINTON DAVIS, DON FIELDS, BOB GLANDON, TOM HAMILTON, DON HANLEY, LARRY HENSLEY, LARRY HILLYARD, BOB HURST, LEROY KEENER, JERRY C. MILLER, DOYLE MILLS, BOB NEELY, K. DON RISINGER, JERRY STURGEON, BILL VILLINES AND DEE WELLS,

Petitioners,

v.

OKLAHOMA LAW ENFORCEMENT RETIREMENT BOARD, ROY ROGERS, LINDA AKER, SCOTT BEHANNA, RENDA REESE-DAVIS, MICHAEL DIXON, JIM KING, JUNE KLAASSEN, KEITH LEIMBACH, JAN MILLER, JAMES PETE PETERSON, HARRY ROSENGRANTS, KEVIN WARD AND PHILLIP R. KEY,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

The Respondents disagree with each of the five (5) questions presented by Petitioners as the questions this Court should consider because the Petitioners' questions presented do not accurately reflect the ruling of the Tenth Circuit Court of Appeals, nor are the issues which Petitioners now seek to raise the same issues which were presented below. The sole question which should be presented to this Court is:

1. Did the Tenth Circuit Court of Appeals correctly determine whether Petitioners' cause of action was moot because the relevant statute was amended after the district court rendered its March 5, 2002, decision?

PARTIES TO THE PROCEEDING IN THE COURT OF APPEALS AND DISTRICT COURT

The parties to the proceeding before the United States District Court for the Western District of Oklahoma consisted of 181 Plaintiffs and the Oklahoma Law Enforcement Retirement Board and its 13 individual Board members who were named as Defendants.

Upon the filing of the appeal to the Tenth Circuit Court of Appeals, the Plaintiffs became Appellants, with 6 of the Plaintiffs voluntarily dismissing their cause of action.

In the case before this Court only 21 individuals are currently appearing as Petitioners. Of the 21 named Petitioners, 4 individuals appear to have been included as Petitioners who were not named parties to the litigation below, specifically: Mary K. Bergen, Larry Hensley, Leroy Keener and Dee Wells. The Respondents respectfully request that these four individuals who were not named parties below be stricken as Petitioners from the instant Petition For Writ of Certiorari.

In addition to these 4 individuals, there are an additional 10 individuals listed as Petitioners whose names are different in the Petition than how they appeared in the proceedings below, specifically: Jerry Brittain, Gordon Calerwood, Bob Glandon, Tom Hamilton, Don Hanley, Larry Hillyard, Bob Hurst, Bob Neely, K. Don Risinger, Bill Villines. Although the differences in the names are subtle, Respondents assume that these 10 individuals may be the same individuals from the proceedings below; however, in the event they are not the same individuals,

PARTIES TO THE PROCEEDING IN THE COURT OF APPEALS AND DISTRICT COURT – Continued

the Respondents would object to their being included in this action.

The current list of named Petitioners include:

CHARLIE ANNIS, MARY K. BERGEN, JERRY BRITTAIN, GORDON CALERWOOD, WALTER CROW, QUINTON DAVIS, DON FIELDS, BOB GLANDON, TOM HAMILTON, DON HANLEY, LARRY HENSLEY, LARRY HILLYARD, BOB HURST, LEROY KEENER, JERRY C. MILLER, DOYLE MILLS, BOB NEELY, K. DON RISINGER, JERRY STURGEON, BILL VILLINES AND DEE WELLS.

The following parties were named as Defendants in the district court, Appellees in the proceeding before the Court of Appeals, and are currently appearing as Respondents herein:

OKLAHOMA LAW ENFORCEMENT RETIREMENT BOARD, ROY ROGERS, LINDA AKER, SCOTT BEHANNA, RENDA REESE-DAVIS, MICHAEL DIXON, JIM KING, JUNE KLAASSEN, KEITH LEIMBACH, JAN MILLER, JAMES PETE PETERSON, HARRY ROSENGRANTS, KEVIN WARD AND PHILLIP R. KEY

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CITATIONS OF THE OPINIONS AND ORDERS ENTERED IN THE CASE

1. On April 24, 2003, the Tenth Circuit Court of Appeals in Case No. 02-6246 concluded that the issues raised by the Plaintiffs/Appellants in their appeal were moot and thereby dismissed Plaintiffs/Appellants' appeal. This Order and Judgment is attached as Appendix A to the Petition. No Petition For Rehearing before the Tenth Circuit Court of Appeals was filed by the Plaintiffs/ Appellants.

2. On July 17, 2002, the District Court For the Western District Of Oklahoma in Case No. CIV-01-418-A (Marten) denied Plaintiffs' Motion For New Trial by Memorandum Order which was filed July 19, 2002. This Memorandum Order is attached as Appendix B to the Petition.

3. On February 27, 2002, the District Court For the Western District of Oklahoma in Case No. CIV-01-418-A (Marten) granted Defendants' Motion to Dismiss by Memorandum Order which was filed March 5, 2002. This Memorandum Order is not attached to Petitioners' Petition. Respondents hereby attach the Memorandum Order filed March 5, 2002, as Appendix A to Respondents' Brief In Opposition.

4. None of the above-referenced Orders were published.

BASIS FOR JURISDICTION IN THIS COURT

The Order and Judgment of the Tenth Circuit Court of Appeals which dismissed Plaintiffs/Appellants' appeal as

moot was filed on April 24, 2003. No petition for rehearing was filed in the case. Petitioners assert in their JURISDICTIONAL STATEMENT that:

> "Jurisdiction is proper pursuant to Supreme Court Rule 10.1(c), which allows the Court to assume jurisdiction in a case where 'a United States court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decision of this Court.'"

Respondents deny that jurisdiction is proper as alleged by the Petitioners pursuant to their citation to "Supreme Court Rule 10.1(c)". Assuming the Petitioners were referring to Supreme Court Rule 10(c), the Respondents would still disagree with Petitioners' assertion that "a United States court of appeals [the Tenth Circuit] has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable [relevant] decisions of this Court". The Respondents believe that the United States Court of Appeals for the Tenth Circuit decided this case on a basic fundamental precept of law. That well recognized precept is the doctrine of mootness. Clearly, the Petitioners have not supported in their Petition For Writ of Certiorari by their claim of jurisdiction under Supreme Court Rule 10(c) or any other compelling reason.

CONSTITUTIONAL PROVISION, STATUTES AND OTHER AUTHORITIES INVOLVED IN THE CASE

Respondents disagree with Petitioners' assertions that the "Fourteenth Amendment to the United States Constitution, Article 2, Section 15 of the Oklahoma Constitution, Article 5, Section 54 of the Oklahoma Constitution, or Title 74, Section 923(A) of the Oklahoma Statutes" are applicable to this case. Immediately illustrative of the inapplicability of one of the foregoing provisions is shown by the fact that 74 O.S. §923(A) does not refer to or involve the Oklahoma Law Enforcement Retirement System (***"OLERS"***). 74 O.S. §923(A) involves the Oklahoma Public Employees Retirement System (***"OPERS"***). The laws, pertaining to the Oklahoma Public Employees Retirement System found under 74 O.S. §901 et seq., are separate and distinct from the laws pertaining to the Oklahoma Law Enforcement Retirement System found under 47 O.S. §2-300 et seq. These are two completely separate retirement systems. The remaining cited constitutional sections will be shown to be inapplicable in the body of this response.

The following statutes and other authorities are involved in this case:

(1) Okla. Stat. Tit. 47, §2-305 amended effective July 1, 1980.

(2) Okla. Stat. Tit. 47, §2-305 amended effective July 1, 2002.

(3) 12 O.S. §95.

(4) Rule 10, Supreme Court Rules

> Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for

compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:

. . . .

> (c) a state or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

(5) Rule 15(2), Supreme Court Rules (in pertinent part)

> . . . In addition to presenting other arguments for denying the petition, the brief in opposition should address any perceived misstatement of fact or law in the petition that bears on what issues properly would be before the Court if certiorari were granted. Counsel are admonished that they have an obligation to the Court to point out in the brief in opposition, and not later, any perceived misstatement made in the petition. . . .

STATEMENT OF THE CASE

On **March 8, 2001,** the Plaintiffs, consisting of 181 individuals, filed a Complaint in the United States District Court for the Western District of Oklahoma against the

Defendants, the Oklahoma Law Enforcement Retirement System Board and the 13 individual Board members. Plaintiffs were seeking a declaratory judgment and injunctive relief in support of a claim for money damages as a result of a 1980 legislative change to 47 O.S. §2-300 et seq., involving the retirement laws that relate to the Oklahoma Law Enforcement Retirement System. The Plaintiffs later dismissed their claims for monetary damages choosing only to seek prospective declaratory and injunctive relief concerning future retirement benefits.

The effective date of the legislative change to 47 O.S. §2-305 was **July 1, 1980**. Accordingly, Plaintiffs' Complaint was filed almost **twenty-one (21) years** after the effective date of the 1980 legislative amendment. The Defendants moved to dismiss the case asserting that all of the Plaintiffs' claims were barred by the statute of limitations. The District Court granted Defendants' Motion To Dismiss by Memorandum Order filed March 5, 2002. The Plaintiffs filed a Motion For New Trial on March 14, 2002, which was thereafter denied by Order filed July 19, 2002.

The Plaintiffs thereafter filed an appeal to the United States Court of Appeals for the Tenth Circuit. The Tenth Circuit on April 24, 2003, dismissed the Plaintiffs/Appellants' appeal after finding that the Oklahoma Legislature amended OKLA. STAT. tit. 47, §2-305 in its 2002 regular session. The Tenth Circuit determined that the amendment effectively resolved the Plaintiffs/Appellants' complaints concerning future retirement benefits that Plaintiffs/Appellants claimed are due, thereby granting Plaintiffs/Appellants the relief they sought. The Plaintiffs/Appellants conceded that they were granted the relief that they sought. The Tenth Circuit further determined that there was not a live controversy because there were

no continuing present effects, therefore Plaintiffs/Appellants could not demonstrate a good chance of being likewise injured in the future. It is from this determination that the instant Petition for Writ of Certiorari is brought by the 21 named Petitioners.

ARGUMENTS FOR DENYING THE PETITION

A. The Decision of the Tenth Circuit Court of Appeals Dismissing the Appeal of the Plaintiffs/Appellants Based Upon Mootness Was Correct and Does Not Merit Review by This Court.

1. Petitioners Have Not Established a Compelling Reason for Granting the Writ.

Petitioners request that this Court review the Tenth Circuit Court of Appeals' decision dismissing their appeal. Rule 10 of the Supreme Court Rules provides:

> Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:
>
> . . . .
>
> (c) a state or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important

> federal question in a way that conflicts with relevant decisions of this Court.
>
> A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

Petitioners have not supported that the writ should be granted for any of the reasons set forth in Rule 10; instead Petitioners argue that a writ is appropriate because the Tenth Circuit applied the doctrine of mootness to dismiss their appeal. Petitioners do not allege that the Tenth Circuit has entered a decision in conflict with the decision of another United States Court of Appeals on the same important matter. Nor do they allege that the Tenth Circuit has decided an important federal question in a way that conflicts with a decision by a state court of last resort. Instead, Petitioners argue that the Tenth Circuit "has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decision of this Court." Yet, Petitioners have not supported their alleged basis for jurisdiction, instead Petitioners argue that the Tenth Circuit decision is in conflict with previously established law and that the Tenth Circuit departed from the accepted and ususal course of judicial proceedings in failing to apply the law of Oklahoma to the facts as found by the trial court. The failure of the Petitioners to support their claimed basis for this Court's jurisdiction should be fatal to their Petition for Writ of Certiorari.

2. The Petitioners' Claims That the Tenth Circuit Court of Appeals Violated the Oklahoma Constitution Are Both Unfounded and Improperly Raised.

Under question 1 of the QUESTIONS PRESENTED by the Petitioners in their Petition, Petitioners ask:

> "1. Whether the Tenth Circuit Court of Appeals erred when it found that legislation passed following the decision in the case by the Western District Court prevented the Petitioners from suffering any continuing or future damages, thus Petitioners' action was moot, and did not find that the passage of specific, 'ex post facto law' by legislature to [sic] solely designed to eliminate Petitioners' cause of action is unconstitutional and in violation of Article II, Section 15 of the Oklahoma Constitution?"

To support this question the Petitioners argue that the 2002 amendment of 47 O.S. §2-305, which granted them the relief that they originally sought from the trial court, is somehow violative of Article 2, Section 15, of the Oklahoma Constitution and is an ex post facto law. Clearly, this is not a criminal case nor is this a case where Petitioners are subject to any type of criminal punishment. This case is purely civil in nature.

In ***Paul v. State***, 1971 OK CR 28, 483 P.2d 1176, the Oklahoma Court of Criminal Appeals in discussing the ex post facto application of sections of law stated:

> "The prohibition of ex post facto legislation is limited to those laws which pertain to the substantive criminal law, such that their retroactive application increases the punishment from a

> crime or detrimentally changes the essential elements of a crime."

In the instant case the 2002 amendment to 47 O.S. §2-305 was applied prospectively only and not retrospectively. Further its passage did not cause or create any disadvantage to a prisoner, rather it provided for additional retirement benefits for the Petitioners. Accordingly, the ex post facto argument must fail.

As to the argument advanced by Petitioners concerning Article 5, Section 54 of the Oklahoma Constitution dealing with repealed statutes, it should be noted that 47 O.S. §2-305 was not repealed but was amended. Once again, this 2002 amendment clearly had no detrimental effect on the Petitioners, rather it gave the Petitioners the retirement benefit that they were seeking.

A longstanding rule under Oklahoma law is that an individual cannot challenge the constitutionality of a statute unless the individual is injured thereby. See ***Dablemont v. State, Department of Public Safety***, 1975 OK 162, 543 P.2d 562; ***In Re Mayes-Rogers Counties Conservancy Dist. Form***, 1963 OK 206, 386 P.2d 150; and ***In Re Central Oklahoma Master Conservancy Dist.***, 1961 OK 23, 359 P.2d 725 wherein the Oklahoma Supreme Court stated: "A statute may not be attacked on constitutional grounds by one not injured thereby." The same is true under federal law. See also ***Barrows v. Jackson***, 346 U.S. 249, 255, 73 S.Ct. 1031, 97 L.Ed 1586 (1953); ***Tileston v. Ullman***, 318 U.S. 44, 46, 63 S.Ct. 493, 87 L.Ed. 603 (1943). Here, the Petitioners have not made any showing of injury and therefore lack the requisite standing to challenge the 2002 amendment to 47 O.S. §2-305.

Beyond the fact that these arguments have been shown to be unfounded and that the Petitioners lack standing, it is also true that these issues were not properly raised or asserted before the Tenth Circuit. Petitioners can easily claim that the Tenth Circuit failed to consider the effect of these constitutional sections as applied to the 2002 legislative amendment of 47 O.S. §2-305 because Petitioners failed to assert either Article 2, Section 15 or Article 5, Section 54 of the Oklahoma Constitution in the appeal before the Tenth Circuit. Under Oklahoma law constitutional challenges cannot be raised for the first time on appeal. See ***Pelican Production Corp. v. Mize***, 1977 OK 235, 573 P.2d 703 and ***Grace Drilling Co. v. Novotny***, 1991 OK CIV APP 24, 811 P.2d 907. Accordingly, because of the failure to raise the issue before the Tenth Circuit, Petitioners are precluded from complaining about the 2002 amendment of 47 O.S. §2-305 for the first time in this proceeding. For these reasons, Petitioners' arguments in their first proposition must fail.

3. The Tenth Circuit Followed Well Established Law in Dismissing the Appeal as Moot.

The proper and only issue before this Court in the consideration of whether or not to grant the Petition for Writ of Certiorari is whether the Tenth Circuit correctly dismissed the appeal below as moot.

The Complaint filed by the Plaintiffs below stemmed from a 1980 legislative amendment to the retirement law at issue, 47 O.S. §2-305. The Plaintiffs claim that as a result of the 1980 legislative amendment that their future retirement benefits were unconstitutionally affected.

Although Plaintiffs initially sought payment for retirement benefits from the period starting in 1980 to present when otherwise eligible, this claim for retroactive retirement benefits has since been abandoned. Accordingly, the Plaintiffs' revised claim did not seek to recover past money damages against Defendants below, but rather only sought to obtain a declaratory judgment and injunctive relief requiring Defendants below to make future monthly retirement payments in accordance with the law in effect prior to 1980. Thus, Plaintiffs' claims for increased monthly benefits were prospective in nature only.

In the Forty-Eighth Legislature of the State of Oklahoma, Second Regular Session, which convened February 4, 2002, the Oklahoma Legislature passed an amendment to 47 O.S. §2-305, which has in effect returned this section of the retirement law to its pre-1980 application. (See the Oklahoma Session Laws 2002, Volume 1, Oklahoma Law Enforcement Retirement System Act, ch. 332, pg. 1187, pertaining to H.B. No. 2212 and 47 O.S. §2-305, effective July 1, 2002.).

The Tenth Circuit dismissed the appeal after finding that the Oklahoma Legislature amended OKLA. STAT. tit. 47, §2-305 in its 2002 regular session. The Tenth Circuit determined that the amendment effectively resolved the complaints of the Plaintiffs/Appellants below concerning future retirement benefits that Plaintiffs/Appellants claimed are due, thereby granting Plaintiffs/Appellants the relief they sought. The Plaintiffs/Appellants conceded in prior pleadings filed of record with the court that they were granted the relief that they sought by the 2002 legislative amendment. This fact was recognized by Tenth Circuit in its Order and has not been disputed by the Petitioners. The Tenth Circuit further determined that

there was not a live controversy because there were no continuing present effects, therefore Plaintiffs/Appellants could not demonstrate a good chance of being likewise injured in the future.

The Tenth Circuit in making its determination that the appeal was moot relied upon ***Faustin v. City and County of Denver***, 268 F.3d 942 (10th Cir. 2001), ***McClendon v. City of Albuquerque***, 100 F.3d 863 (10th Cir. 1996), ***Beattie v. United States***, 949 F.2d 1092 (10th Cir. 1991) and ***Church of Scientology of California v. United States***, 506 U.S. 9, 113 S.Ct. 447, 121 L.Ed.2d 313 (1992).

A controlling case from this Court which addresses the consideration of moot questions or abstract propositions by the federal courts is ***Church of Scientology of California v. United States***, 506 U.S. 9, 113 S.Ct. 447, 121 L.Ed.2d 313 (1992), wherein this Court stated:

> It has long been settled that a federal court has no authority "to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it." Mills v. Green, *159 U.S. 651*, 653 (1895). See also Preiser v. Newkirk, *422 U.S. 395*, 401 (1975); North Carolina v. Rice, *404 U.S. 244*, 246 (1971). For that reason, if an event occurs while a case is pending on appeal that makes it impossible for the court to grant "any effectual relief whatever" to a prevailing party, the appeal must be dismissed. Mills, 159 U.S., at 653. . . .

The Tenth Circuit has also addressed the issues of mootness and abstract questions. In ***Miller v. Udall***, 368 F.2d 548 (10th Cir. 1966), the Court stated:

> "It is quite clear that the Declaratory Judgment Act is not to be used as a means of securing a judicial determination of moot questions. Such would be a determination of non-justiciable issues, and it is well settled that the Act is procedural only, and that its application is restricted to cases and controversies which are such in the Constitutional sense. The judicial inhibition against deciding moot question is of course not limited to the field of declaratory judgments." 6 Moore's Federal Practice, para. 57.13, at 3071 (2d ed. 1965).
>
> This circuit has held, "A court will decide only real controversies in which the rights of the parties are actually involved, not abstract questions. It will not proceed to a determination when its judgment or decree cannot grant relief for want of subject matter upon which it could operate with effect." Jackson v. Denver Producing & Refining Co., *96 F.2d 457*, 461 (10th Cir. 1938).

See also ***In Re Osborn***, 24 F.3d 1199 (10th Cir 1994); ***Grand Jury Sub. Dated Dec. 7 and 8 v. U.S.***, 40 F.3d 1096 (10th Cir. 1994); and ***Beattie v. United States***, 949 F.2d 1092, 1093 (10th Cir. 1991).

From these cases comes the longstanding propositions that mootness is a threshold issue because the existence of a live case or controversy is a constitutional prerequisite to federal court jurisdiction and that the federal court has no authority to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it. Thus, if an event occurs while a case is pending on appeal that makes it impossible for the court to grant any

effectual relief whatever to a prevailing party, the appeal must be dismissed.

Had the District Court not dismissed the case below based upon the statute of limitations, the Plaintiffs/Appellants before the Tenth Circuit would have received no more relief from the Tenth Circuit than they received by July 1, 2002, legislative amendment of 47 O.S. §2-305. The 2002 legislative amendment made the issues presented by the Plaintiffs/Appellants, abstract questions, for the Tenth Circuits' consideration. Indeed, there was no longer a case or controversy for the Tenth Circuit to determine. Accordingly, based upon the foregoing arguments and authorities, the appeal below had to be dismissed because even the Plaintiffs/Appellants conceded that the Oklahoma Legislature gave them what they were seeking.

4. When Considering the Constitutionality of a Statute, the Courts Will Only Rule Out of Necessity.

Petitioners argue that the Tenth Circuits' decision is in conflict with established law and that the Tenth Circuit departed from the accepted and usual course of judicial proceedings in failing to apply Oklahoma law. However, these arguments as will be shown hereinafter are wholly unfounded. Both Oklahoma and federal law indicates that when considering the constitutionality of a statute, the Courts will only rule out of necessity.

In the case of ***In Re Mayes-Rogers Counties Conservancy Dist. Form***, 1963 OK 206, 386 P.2d 150, the Oklahoma Supreme Court citing its holding from ***In Re***

Central Oklahoma Master Conservancy Dist., 1961 OK 23, 359 P.2d 725, found:

> "A statute may not be attached on constitutional ground by one not injured thereby. In 11 Am. Jur. Constitutional Law, Section 93, p. 720, it is said:
>
> "'While courts will not refuse to pass on the constitutionality of statutes in any proceeding in which such a determination is necessarily involved, needless consideration of attacks on their validity and unnecessary decisions striking down statutes will be avoided. Courts will not assume to pass upon constitutional questions unless properly before them.'
>
> "'One of the most firmly established doctrines in the field of constitutional law is to the effect that a court will pass upon the constitutionality of a law only when necessary to the determination upon the merits of the cause under consideration. The constitutionality of a statute will not be considered and determined by the courts as a hypothetical question, because constitutional questions are not to be dealt with abstractly or in a manner of an academic discussion * * * .'"

A case remarkably similar to the matter before this Court is ***Oklahoma City, Oklahoma v. Dulick***, 318 F.2d 830 (10th Cir. 1963). In the ***Dulick*** case, Oklahoma City property owners brought a declaratory judgment action attacking the validity of certain Oklahoma statutes relating to sanitary sewer districts. The statutes provided for the creation of sewer districts by municipal ordinance. Following the creation of a sewer district which included the property owners' land, the action was brought. The municipal ordinance in question was thereafter repealed. The trial court ruled in property owners favor declaring

the Oklahoma statute unconstitutional. This ruling was appealed to the Tenth Circuit Court of Appeals.

The Tenth Circuit upon considering the matter stated:

> A federal court can declare a state statute void for unconstitutionality only when "it is called upon to adjudge the legal rights of litigants in actual controversy." Liverpool, New York and Philadelphia Steamship Company v. Commissioners of Emigration, *113 U.S. 33*, 39, 5 S.Ct. 352, 355, 28 L.Ed. 899; quoted in Baker v. Carr, *369 U.S. 186*, 204, 82 S.Ct. 691, 703, 7 L.Ed. 2d 663. Federal Courts have no power to give advisory opinions [Alabama State Federation of Labor v. McAdory, *325 U.S. 450*, 461, 65 S.Ct. 1384, 89 L.Ed. 1725] or to adjudicate constitutional questions in absence of "concrete legal issues, presented in actual cases, not abstractions." United Public Workers of American (C.I.O.) v. Mitchell, *330 U.S. 75*, 89, 67 S.Ct. 556, 564, 91 L.Ed. 754. These principles apply to actions for declaratory judgments. Electric Bond & Share Co. v. Securities and Exchange Comm'n, *303 U.S. 419*, 443, 58 S.Ct. 678, 82 L.Ed. 936.
>
> The Tenth Circuit went on to find that the repeal of the ordinance in question eliminated any justiciable controversy from this case. At the time the interest of the appellee-plaintiffs in the constitutionality of the questioned Oklahoma statutes became hypothetical. One who is not affected by a statute may not question its constitutionality. Barrows v. Jackson, *346 U.S. 249*, 255, 73 S.Ct. 1031, 97 L.Ed 1586; Tileston v. Ullman, State's Attorney, *318 U.S. 44*, 46, 63 S.Ct. 493, 87 L.Ed. 603.

> The Tenth Circuit thus determined that the case was moot and, in accordance with approved practice, [See United States v. Munsingware, Inc., *340 U.S. 36*, 39, 71 S.Ct. 104, 95 L.Ed. 36] the judgment was reversed and the case remanded with directions to vacate the judgment and dismiss the action.

This Court has also ruled that constitutional judgments are justified only out of necessity of adjudicating rights in particular cases between litigants brought before the court. ***Broadrick v. Oklahoma***, 413 U.S. 601, 93 S.Ct. 2908, 37 L.Ed 2d 830 (1973).

Based upon the foregoing authorities, the Tenth Circuit properly refused to consider the constitutional arguments concerning the 1980 amendment of 47 O.S. §2-305 after the matter became moot by the 2002 amendment. Clearly, Petitioners have not demonstrated how the Tenth Circuit decision was in conflict with established law or that it departed from the accepted judicial proceedings; accordingly these contentions of error must also fail.

5. Because the Appeal was Dismissed as Moot, the Tenth Circuit Did Not Have to Rule on the Correctness of the Trial Court's Decision and Therefore Petitioners' Propositions II and III are Irrelevant to This Court's Consideration.

In the OPINIONS AND ORDERS BELOW, Petitioners' state "1. On April 24, 2003, the Tenth Circuit Court of Appeals **affirmed the decision** entered by the United States District Court for the Western District of Oklahoma." (Emphasis ours.) This is not a correct statement concerning the ruling by the Tenth Circuit Court of

Appeals. Sup. Ct. R. 15(2). The Tenth Circuit concluded that the issues raised by the Plaintiffs/Appellants were moot and dismissed their appeal. (See the Order and Judgment filed on April 24, 2003.) Despite the Petitioners' assertions to the contrary, because the Tenth Circuit dismissed the case as moot, the Court of Appeals did not have to rule on the correctness of the trial courts' decision concerning the Statute of Limitations. A review of the Tenth Circuit's decision establishes that it did not rule on the Statute of Limitations issue. Accordingly, questions 2, 3, 4 and 5 from the QUESTIONS PRESENTED by the Petitioner in the Petition for Writ of Certiorari are wholly irrelevant to the matter before this Court.

Furthermore, Propositions II and III of Petitioners' Petition are equally irrelevant to the matter before this Court because the Tenth Circuit dismissed the appeal below as moot. Petitioners' Propositions II and III do not address the correctness of the Tenth Circuit's ruling that the claims presented were moot and are simply the same arguments that were previously presented in their Reply Brief to the Tenth Circuit. Despite the fact that this is not a proper issue before this Court, a response will nevertheless be provided in order to demonstrate that contentions under Petitioners' Propositions II and III likewise lack merit.

a. Petitioners are not Entitled to the Protection Accorded by the *Baker* Case.

What Petitioners have not revealed to this Court is that none of the Petitioners were retired, receiving retirement benefits or entitled to receive retirement benefits when the 1980 amendment to 47 O.S. §2-305 occurred. The Petitioners' arguments completely lack merit and are

equally unsupported by competent and persuasive authority. For example, the Petitioners argue that when a member vests the contractual right becomes an inalienable property right. To support this position, Petitioners rely heavily on ***Baker v. Oklahoma Firefighters Pension and Retirement System***, 1986 OK 8, 718 P.2d 348. The ***Baker*** case, however, is unquestionably distinguishable from the appeal at bar on a very significant point. The plaintiffs in the ***Baker*** case timely brought their action and their action was not time barred.

In ***Baker***, the legislative change complained of occurred effective May 26, 1983, and the plaintiffs therein clearly filed their federal court action before the two (2) year statute of limitations expired. In fact, the questions certified to the Oklahoma Supreme Court were certified on May 7, 1985, by the federal court. The statute of limitations was not an issue before the court in ***Baker***. Thus, the ***Baker*** plaintiffs brought their cause of action within the applicable statute of limitations period, two years within which to bring an action in federal court to address legislative change of a statute. Here, where the Petitioners are contesting an amendment to legislative action occurring now over twenty-three (23) years ago, the same cannot be said.

The holdings in ***Baker*** are actually more supportive of the Respondents' position than the Petitioners. For example, in ***Baker***, the Oklahoma Supreme Court found that no contract exists between an employee and the State, concerning the state pension plan, unless and until the pension vests. ***Baker***, at 718 P.2d 352. Vesting, according to the Court, occurs as of the date of retirement. ***Baker***, at 718 P.2d 351, where the Court cited ***Board of Trustees v. Burns***, 1959 OK 275, 348 P.2d 1067. Thus, pursuant to

Baker, the law in Oklahoma regarding statutory pension contracts is clear. A contract does not come into existence between the state employee and the State (through one of its statutory pension systems) until the state employee becomes eligible for retirement.

Under the pension laws pertaining to the Oklahoma Law Enforcement Retirement System, "OLERS", all members, other than those who are disabled, are *not entitled* to begin *receiving payment* of the pension until they have completed twenty (20) years of service. Even if a member terminates his employment and thereafter makes the election to vest, the member would not be eligible for payment of the pension until such time as he reaches his normal twenty (20) year retirement date which is determined as if the member's employment continued uninterrupted. Petitioners in their own pleadings below have admitted that as of July 1, 1980, none of the Petitioners had yet retired. Clearly, as of July 1, 1980, none of the Petitioners had retired; none of the Petitioners had twenty (20) years of service; and none of the Petitioners were receiving the payment of pension benefits. **More importantly, however, the Petitioners have never alleged that they had twenty (20) years of service or were receiving payment of retirement benefits at the time of the 1980 legislative change.** Therefore, their pension rights had not become "**absolute**" as a matter of law and therefore the Oklahoma legislature could constitutionally amend the pension laws including 47 O.S. §2-305.

The intentions of the Oklahoma Supreme Court in ***Baker*** concerning vesting for the purposes of preventing changes to the pension law is made very clear when the Court stated:

> [T]he right of a claimant to a pension is controlled by the terms of the statute in effect when the right to a pension vests and [our prior cases] have implied that ***vesting occurs as of the date of retirement***. (Emphasis ours).

The Oklahoma Supreme Courts' conclusion in ***Baker***, again makes it clear that:

> **[T]he right to the retirement pension benefits provided to firefighters and police officers under our state statutory schemes *becomes absolute at the time those benefits become payable* to those eligible.** . . . (Emphasis ours).

Petitioners cited ***Baker*** for the proposition that pension benefits may not be changed once an employee becomes vested. However, this is not exactly what ***Baker*** held. Rather, ***Baker*** held that those firefighters who had retired or who could have retired and become eligible for payment of pension benefits prior to the effective date of legislative changes in the law acquired a right under those statutory provisions which could not be detrimentally affected by subsequent acts of the legislature. Thus, based upon the rulings in ***Baker***, because Petitioners' pension benefits were not absolute, the Oklahoma legislature could amend 47 O.S. §2-305, as to all Petitioners who could not have retired and become eligible for payment of pension benefits prior to the effective date of statutory change. Therefore, the acts of the legislature in 1980 changing Section 2-305 were not unconstitutional, nor violative of either the Oklahoma or federal constitution.

b. Statute of Limitations Apply to Petitioners' Claims.

Irrespective of the fact that the 2002 legislative amendment has rendered this matter moot and that the Petitioners' claims were time barred, the Petitioners nonetheless bring this appeal asking this Court to reverse the decision of the Tenth Circuit. The Petitioners argue that there is no Statute of Limitations. Conversely, the Respondents have previously supported the dismissal of this untimely brought case through citations of authority recognized by the District Court in its Memorandum Opinion of March 5, 2002, that indeed a statute of limitations does apply in this case and acts as a bar to the relief sought by the Petitioners. (See 12 O.S. Supp. 2000, §95; ***Gilbert v. City of Cambridge***, 745 F. Supp. 42, 46 (D. Mass. 1990); ***City of Oklahoma City v. Daly***, 1957 OK 209, 316 P.2d 129; and ***Meade v. Grubbs***, 841 F.2d 1512,1522-24 (10th Cir. 1988)).

c. Oklahoma Has Applied a Five Year Statute of Limitations to Claims Identical To Petitioners.

This Court should further consider ***Kinzy v. State ex rel. Oklahoma Firefighters Pension and Retirement System***, 2001 OK 24, 20 P.3d 818. ***Kinzy*** is the most recent decision of the Oklahoma Supreme Court concerning the issue of the statute of limitations to be applied to claims against a public retirement system similar to the Respondents herein. In ***Kinzy***, the Oklahoma Supreme Court applied a five (5) year statute of limitation to claims filed by firefighters seeking a retroactive payment of retirement benefits and determined their claims to be time-barred. The ***Kinzy*** Court declined to recognize

Plaintiffs' claims of a breach of fiduciary duty and instead treated the case as a breach of contract applying 12 O.S. 1991, §95, subd. 1. The significance of ***Kinzy*** to the instant appeal is that the Oklahoma Supreme Court has ruled that litigation such as the Petitioners have brought herein can be time barred. The ***Kinzy*** Court further recognized the jurisdictional limitations upon the United States District Court in ***Baker***, supra, by recognizing the limitations imposed by the Eleventh Amendment of the United States Constitution.

The Court in ***Kinzy*** specifically stated: "The enactment of a statute of limitations is a legislative expression of policy 'that prohibits litigants from raising claims after the expiration of a given period of time'. Generally the limitation period for a breach-of-contract claim accrues when the party asserting it first acquires the right to sue." The ***Kinzy*** Court further stated: "A prudent plaintiff is required to pursue its claim with reasonable diligence. Those who refrain from pursuing inquiries plainly suggested by the facts will not be extended the benefit of a rule which would toll the applicable statutes of limitations." Here, the action brought by the Petitioners twenty-one (21) years after the 1980 legislative amendment cannot be said to have been pursued with reasonable diligence.

d. The Opinion of the Attorney General of Oklahoma cited by the Petitioners is Inapplicable to the Oklahoma Law Enforcement Retirement System.

Petitioners next argue that once a law enforcement officer has vested, the contractual nature of the obligation changes to a property right. In support of their argument,

Petitioners reference an Oklahoma Attorney General's Opinion. Petitioners state that in the referenced Attorney General Opinion, it states that pension benefits offered by OLERS have been held to be significantly different from those of other public employees. They further claim that the distinctive nature of the law enforcement pension plan is discussed in detail. Although, the Petitioners have never supplied to the Respondents a copy of their referenced Attorney General's Opinion, Respondents believe that the Opinion they have referred to is Attorney General's Opinion 95-45, dated March 28, 1996. This Opinion does not specifically refer to OLERS at all. The primary focus of this Opinion related to the Oklahoma Public Employees Retirement System, 74 O.S. §901 et seq. That system is not the same as OLERS. The other references in that Opinion refer to the Oklahoma Police Pension and Retirement System and the Oklahoma Firefighters Pension and Retirement System. These systems are found at 11 O.S. §49-100 et seq. and 11 O.S. §50-101 et seq. Again, these two systems are also not OLERS. Clearly, the Petitioners' assertions made in Proposition III are incorrect, misleading, and improper because Attorney General's Opinion 95-45 does not discuss OLERS. Even if the Petitioners' statement were correct concerning the Attorney General Opinion, this advisory opinion would not overrule a decision of the Oklahoma Supreme Court. Thus, the holdings in ***Baker*** is the controlling authority and therefore the Petitioners' self-serving arguments concerning vested retirement benefits are erroneous as a matter of law and cannot serve as a basis to overturn the decisions below.

CONCLUSION

Petitioners' arguments fail to present a compelling reason for granting a Writ of Certiorari as the Tenth Circuit correctly applied longstanding precepts of both Oklahoma and Federal law in dismissing the underlying appeal as moot. None of the questions presented by Petitioners raise an important question of federal law that has not been, but should be, settled by this Court. Further, the Tenth Circuit's decision is not in conflict with the relevant decisions of this Court. Clearly, the Tenth Circuit was correct in declining to rule upon abstract propositions or to declare principles or rules of law which cannot affect the matter in issue in the case before it. This Court should therefore deny the Petition for Writ of Certiorari.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

MICKEY D. ADAM, et al., Plaintiffs, vs. OKLAHOMA LAW ENFORCEMENT RETIREMENT BOARD as set forth in Oklahoma Statutes Title 47 Sections 2-300 et seq., et al., Defendants.	)	No. CIV-01-418-A (Marten)

MEMORANDUM ORDER

(Filed Mar. 5, 2002)

Currently before the court in this action challenging the Oklahoma system of law enforcement retirement benefits is the motion by the defendants to dismiss on the grounds that the action is barred by the statute of limitations. Plaintiffs challenge the constitutionality of the Oklahoma legislature's decision in 1980 to alter the formula for retirement benefits. Plaintiffs are former highway patrolmen who were vested in the retirement system by July 1, 1980.

The present action was filed on March 8, 2001, over twenty years after the challenged legislation. Despite repeated opportunities, plaintiffs have never effectively addressed the issue of the statute of limitations, other than speculating, without authority, that either no statute of limitations applies to their claim, or that the complaints may somehow be maintained pursuant to 12 O.S. § 101. The general Oklahoma Statute of limitations, 12 O.S. Supp. 2000 § 95, governs the action. It provides:

> Civil actions other than for the recovery of real property can only be brought within the following periods, after the cause of action shall have accrued, and not afterwards:
>
> 1. Within five (5) years: An action upon any contract, agreement or promise in writing;
>
> 2. Within three (3) years: An action upon a contract expressed or implied not in writing; an action upon a liability created by statute other than a forfeiture or penalty; and an action on a foreign judgment;
>
> 3. Within two (2) years: . . . an action for injury to the rights of another.

Here, the cause of action began at the time of the challenged legislative act. *See Gilben v. City of Cambridge*, 745 F.Supp. 42, 46 (D. Mass. 1990). Pursuant to subsection 2 of the statute of limitations, the plaintiffs had three years from the legislative action in 1980 to bring their claims grounded on alleged violation of the state constitution. *See City of Oklahoma City v. Daly*, 316 P.2d 129 (Okla. 1957) (civil action asserting violation of state constitution was a claim "upon a liability created by a statute" within meaning of the statute of limitations). But, even assuming the longest statute of limitations period (five years for actions upon contract) applied, the present action's claims asserting state constitutional violations would remain outside the time permitted by law. With respect to plaintiffs' claims asserting violation of the federal constitution, such claims are subject to the two-year limitations period for an action "for injury to rights of another." *Meade v. Grubbs*, 841 F.2d 1512, 1522-24 (10th Cir. 1988).

There is no tolling doctrine or other exception to the time bar applicable in the present action. For example, there is no conflict between defendants' actions and existing Oklahoma or federal statutes. *Cf. Elephant Butte Irr. Dist. v. Department of Interior*, 160 F.3d 602 (10th Cir. 1998). Section 101, which provides for tolling of the statute in certain cases such as partial payment of an acknowledged debt or upon an open account, has no application herein. Plaintiffs have wholly failed to demonstrate the payment of any disputed amounts by the defendants, any written acknowledgment of an existing liability, or a promise in writing signed by the defendants to pay the claims of the plaintiffs.

In sum, the time bar of § 95 applies. Plaintiffs have failed to identify any credible basis for avoiding application of the bar.

IT IS ACCORDINGLY ORDERED this 27th day of February, 2002, that the defendants' Motion to Dismiss is hereby granted.

/s/ J. Thomas Marten
J. THOMAS MARTEN, JUDGE